Krishnasamy a/l Supramany v Arab-Malaysian Finance Bhd

HIGH COURT (IPOH) — CIVIL SUIT NO 22–157 OF 1999
BALIA YUSOF J
25 NOVEMBER 2008

Contract — Breach — Agreement for purchase of car — Hire purchase agreement — Registration number of vehicle belonging to motorcycle — Application to transfer ownership refused by JPJ — Whether defendant had good title to car when agreement was entered — Whether plaintiff entitled to treat agreement as discharged and for return of money already paid under agreement — Whether plaintiff entitled to claim for damages for anxiety and inconvenience caused — Contracts Act 1950 s 57(2)

The plaintiff bought from the defendant a BMW car bearing the registration No KK 1109 at the purchase price of RM32,000. A sum of RM9,900 was paid as a deposit and a loan for the sum of RM22,100 was granted to the plaintiff by the defendant and the repayment was by 35 monthly installments. The plaintiff had enquired about the amount of loan outstanding with a view to settle it in full as he had found a purchaser who was interested to buy the car from him. He was told that the transfer of the said car could not be effected as the registration card of the same had been detained by the Jabatan Pengangkutan Jalan ('JPJ') because the vehicle No KK 1109 belonged to a motorcycle model FR 80 and not the BMW car bought by the plaintiff. The plaintiff therefore, requested the defendant to take back the car and at the same time asked for the return of his deposit of RM9,900 and a further sum of RM17,192 being the amount of 28 monthly installments paid to the defendant. The plaintiff also claimed, inter alia, damages arising out of the expenses incurred to hire a car for his use and damages for anxiety caused as a result of being blacklisted by financial institutions. The issue before the court was whether the defendant had a good title to the said BMW car when the hire purchase agreement was entered into and whether the same could give a good title to the plaintiff.

Held, allowing the plaintiff's claim with costs:

(1) The failure of the defendant to deliver the proper registration card and to have the car properly registered upon the full payment by the plaintiff, was a breach of a fundamental term of the hire purchase

agreement. As such, the plaintiff, as the hirer, was entitled to treat the hire purchase agreement as discharged and entitled to claim damages for the breach of the said agreement or for the return of the money already paid under the agreement (see para 13).

(2) The plaintiff's claim for general damages for the anxiety and inconvenience caused to him as a result of the problem he had with the defendant finance company was allowed. He had been blacklisted and was not in position to obtain financing from any financial institutions. Further, he was also inconvenienced for loss of use of the car which he had purchased from the defendant. The plaintiff was entitled to claim for loss of use in the form of general damages. Assessment of damages are based on the evidence adduced and to some extent, the damage may have been inferred or presumed (see para 15).

[Bahasa Malaysia summary

Plaintif telah membeli sebuah kereta BMW yang mempunyai nombor pendaftaran KK 1109 pada harga belian sebanyak RM32,000. Sejumlah RM9,900 telah dibayar sebagai bayaran deposit dan pinjaman bagi sejumlah RM22,100 telah diberikan kepada plaintif oleh defendan dengan pembayaran semula secara ansuran selama 35 bulan. Plaintif yang ingin tahu berkenaan dengan baki jumlah pinjaman dengan tujuan untuk penyelesaian penuh kerana plaintif telah bertemu dengan seorang pembeli yang berminat hendak membeli kereta tersebut daripadanya. Plaintif telah diberitahu bahawa pindah milik kereta tersebut tidak boleh dilakukan kerana kad perakuan pendaftaran telah ditahan oleh Jabatan Pengangkutan Jalan ('JPJ') kerana kenderaan bernombor KK 1109 adalah milik sebuah motorsikal model FR 80 dan bukannya kereta BMW yang dibeli oleh plaintif. Plaintif kemudiannya, meminta defendan mengambil kembali kereta tersebut dan pada masa yang sama meminta dipulangkan depositnya sejumlah RM9,900 dan tambahan RM17,192 sebagai jumlah ansuran 28 bulan yang telah dibayar kepada defendan. Plaintif juga menuntut, antara lain, ganti rugi yang timbul daripada perbelanjaan yang ditanggung untuk menyewa kereta untuk kegunaannya sendiri dan ganti rugi bagi kebimbangan yang berlaku disebabkan disenarai hitam oleh institutsi kewangan. Isu di hadapan mahkamah adalah sama ada defendan mempunyai hak milik yang sah kepada kereta BMW tersebut apabila perjanjian sewa beli dimasuki dan sama ada perkara tersebut boleh memberikan hak milik yang sah kepada plaintif.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Kegagalan defendan menyerahkan kad perakuan pendaftaran yang betul dan mendaftarkan kereta tersebut secara teratur apabila

pembayaran penuh oleh plaintif, adalah kemungkiran terma asas perjanjian sewa beli. Oleh itu, plaintif, sebagai penyewa, adalah berhak untuk memperlakukan perjanjian sewa beli sebagai pelepasan dan berhak menuntut ganti rugi untuk kemungkiran perjanjian tersebut atau pengembalian wang yang telah dibayar di bawah perjanjian tersebut (lihat perenggan 13).

(2) Tuntutan plaintif untuk ganti rugi am bagi kebimbangan dan kesulitan yang berlaku kepadanya akibat daripada masalah yang dihadapinya dengan syarikat kewangan defendan adalah dibenarkan. Plaintif telah disenaraihitamkan dan tidak berada dalam kedudukan untuk mendapatkan pinjaman daripada mana-mana institusi kewangan. Selanjutnya, plaintif juga menghadapi kesulitan bagi kehilangan penggunaan kereta yang telah dibelinya daripada defendan. Plaintif adalah berhak untuk menuntut kerugian penggunaan dalam bentuk ganti rugi am. Taksiran ganti rugi adalah berdasarkan kepada keterangan yang dikemukakan dan sehingga tahap tertentu kerugian boleh disimpulkan dan dianggap (lihat perenggan 15).]

Notes

For a case on agreement for purchase of car, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 2534.

Cases referred to

Arab Malaysian Finance Bhd v Samian Sabin & Anor [2003] 5 MLJ 403; [2003] 2 CLJ 115, HC (refd)

BBMB Kewangan Bhd v Tan Swee Heng & Anor [2002] MLJU 330; [2002] 7 CLJ 377, HC (folld)

Foong Chee Chong (suing as sole proprietor of the firm Tien Chan Goldsmith & Jewellers) v Inspector Mohd Nasir bin Shamsuddin & Anor [1986] 6 MLJ 421, HC (refd)

Heng Loong Motor Trading Co v Osman bin Abdullah [1994] 2 MLJ 456 (refd)

Magnum Finance Bhd v Tan Ah Poi & Anor [1996] MLJU 538; [1997] 3 AMR 2265, HC (folld)

Public Finance Bhd v Ehwan Saring [1996] 1 MLJ 331, HC (folld)

Yip Shou Shan v Sin Heap Lee-Marubeni Sdn Bhd [2002] 5 MLJ 113, HC (refd)

Legislation referred to

Contracts Act 1950 s 57(2)

Sakthivel (Sakthi & Co) for the plaintiff.
Thinakaran (Lalchand & Nawawi) for the defendant.

Balia Yusof J:

FACTS

[1] By way of a hire purchase agreement dated 19 March 1991, the plaintiff bought a BMW car bearing the registration No KK 1109 engine No 6716823 and chasis No WBA 18120006716823. The defendant is the owner of the said car, and as agreed between them, the purchase price is RM32,000. The plaintiff paid RM9,900 as a deposit and a loan in the sum of RM22,100 was granted to the plaintiff by the defendant. The said loan was repayable in 35 monthly installment of RM614, the last installment being RM610.

[2] On or about 1 July 1993 the plaintiff went over to the defendant's branch office at Teluk Intan and enquired about the amount of loan outstanding with a view to settle it in full as he had found a purchaser who was interested to buy the car from him. Instead, the plaintiff was told by an officer of the defendant that the transfer of the said car could not be effected as the registration card of the same had been detained by the Jabatan Pengangkutan Jalan ('JPJ'). According to the JPJ the registration card of the vehicle No KK 1109 belongs to a motorcycle model FR 80 and not the BMW car bought by the plaintiff. The defendant had on 23 April 1991 submitted an application for the transfer of ownership of the said vehicle to the JPJ. Upon a letter of reminder by the defendant dated 16 July 1993 the JPJ replied in their letter dated 26 July 1993 informing the defendant that the department could not approve the application for the transfer.

[3] Upon hearing that the transfer of the vehicle could not be effected, the plaintiff requested the defendant to take back the car and at the same time asked for the return of his deposit of RM9,900 and a further sum of RM17,192 being the amount of 28 monthly installments paid to the defendant. Since then, the plaintiff has repeatedly asked the defendant to take back the car and for the return of his money. On 8 July 1994 the defendant instituted an action against the plaintiff claiming for arrears of installment amounting to RM4,926.07 in the Teluk Intan Magistrates Court via Saman No 72–110 of 1994 but later discontinued the action via *notis pemberhentian* dated 29 August 1994. On 10 August 1997 the plaintiff wrote a letter (exh P2) to the defendant informing the same that he will be charging storage fees at RM20 per day from the month of July 1993 to the date of the said letter and RM50 per day until the car is repossessed by the defendant. On 10 September 1997 the defendant replied via a letter dated the same (p 13 encl 24, the agreed bundle of document) informing the plaintiff that they were not able to do so as the JPJ has not approved the transfer and that the

matter is beyond the defendant's control. The present suit against the defendant was filed by the plaintiff on 19 May 1999. The claims of the plaintiff are as follows:

(1) satu deklarasi bahawa surat perjanjian sewa beli bertarikh 19 March 1991 di antara plaintif dan defendan adalah batal;

(2) defendan mengembalikan wang sebanyak RM27,092 kepada plaintif;

(3) bayaran bagi simpan kereta;

(4) ganti rugi am dan khas;

(5) faedah;

(6) kos; dan

(7) relief lain atau sebagainya yang dianggap sesuai oleh mahkamah.

THE DEFENCE

[4] In defence, the defendant states that a receipt was issued by the JPJ acknowledging that an application for the transfer of the vehicle was submitted. However it is admitted that the receipt is only proof of payment for the application but not an approval of the application. The defendant also admitted that they used the services of a 'runner' to do the transaction and the defendant does not actually had knowledge what really has transpired or happened in the process. The original registration card was held by the JPJ and never returned to the defendant. The defendant also admits that no action to repossess the car from the plaintiff was taken and no reason was given for that stance taken.

ISSUES

[5] Whether the defendant has a good title to said BMW car No KK 1109 when the hire purchase agreement was entered into on 19 March 1991 and whether the same can give a good title to the plaintiff.

EVIDENCE

[6] The plaintiff closed his case after SP1 gave evidence and thereafter SD1 was called as a witness for the defence. After the close of the defence case, the plaintiff made an application to reopen the plaintiff's case to enable him to call another witness for the plaintiff. The application in lampiran 44 was subsequently heard and argued in open court. Upon hearing submissions from both parties, the application was allowed and SP2 was called to the stand to give evidence in support of the plaintiff's case.

[7] SP2, one Salehuddin bin Saman is an officer of the JPJ, Ipoh who holds the post of Ketua Unit Tukar Milik dan Rekod, JPJ, Ipoh. In his evidence the witness states that according to the records of the department, the vehicle No KK 1109 belongs to a motorcycle, Suzuki FR 80 and produced the record which was marked as exh P5.

[8] According to exh P5, the owner of the said vehicle is one Mohd Zaki bin Hanafi and the record is classified under 'Status O'. According to the witness, 'Status O' means 'rekod tidak sah' and by 'rekod tidak sah' it means, to quote his evidence in court:

> Rekod tidak sah bermakna data ada dalam komputer tetapi bagi tujuan pengesahan kenderaan diperlukan untuk pemeriksaan dan kad pendaftaran kenderaan perlu dikemukakan kepada JPJ dan salinan kad pengenalan pemilik kenderaan berkenaan.

He went on to state that:

> Status O bermakna kenderaan tersebut tidak boleh di pindah milik.

[9] It is very apparent that the details in the copy of the registration card (at pp 5 and 6 of the agreed bundle of document) which was given to the plaintiff by the defendant when he signed the hire purchase agreement is different from the records of the vehicle No KK 1109 held by the JPJ. Upon being questioned by the court, this witness confirms that the record maintained by the department in exh P5 is conclusive of the current status of the vehicle, which means, it is not transferrable. The evidence also discloses that at no time was the car BMW KK 1109 handed over to the JPJ for inspection.

[10] From the facts enumerated above it is crystal clear that the defendant as owner of the said motorcar is not in a position to transfer the same to the plaintiff. When the defendant entered into the said agreement it is expressly stated as an express condition of the agreement that it is the owner of the vehicle and it is represented that it was capable of giving a good title to the plaintiff whenever the plaintiff decides to settle the purchase price in full. From the evidence, it is established that the said motorcar was never registered at all with the JPJ and it is doubtful whether there was such a vehicle which has that registration number with the JPJ. That being so, clearly there is a total failure of consideration. Under the circumstances, is also very clear that it is impossible for the defendant to transfer the vehicle to the plaintiff and that being so, it is my view that the said agreement has become void within the contemplation of s 57(2) of the Contracts Act 1950 which reads:

A A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

B **[11]** The said BMW motorcar No KK 1109 engine No 6716823 and chasis No WBA 18120006716823 was never registered as stated in the agreement and never exist in the record of the JPJ.

[12] The case of *Magnum Finance Bhd v Tan Ah Poi & Anor* [1996] MLJU C 538; [1997] 3 AMR 2265 cited by the plaintiff has very much similarity with this case and I fully concur with the proposition of law made by the learned judge therein. Having referred to the other authorities of *Public Finance Bhd v Ehwan Saring* [1996] 1 MLJ 331 and *BBMB Kewangan Bhd v Tan Swee Heng & Anor* [2002] MLJU 330; [2002] 7 CLJ 377 cited by learned counsel D for the plaintiff, I am in agreement with the court's view in both cases in concluding that:

(i) the conduct and actions of the financial institutions showed that they had held themselves as owners of the vehicle at the time the agreement E was entered into and that they were capable of giving a good title to the hirer whenever he might choose to end the hiring by paying the balance due;

(ii) the conditions and warranties under s 7(1) of the Hire Purchase Act 1967 must apply and the seizure caused the financial institutions to be F in breach of all the three conditions and warranties therein which goes to the root of the agreement and upon such breach, the hirer's liability under the agreement comes to an end;

(iii) following the seizure of the vehicle, the financial institution, as owner, G could no longer fulfill any of the conditions and warranties under s 7(1) of the Hire Purchase Act 1967. There was thus a complete failure of consideration of the agreement such as to warrant the application of ss 57(2) and 66 of the Contracts Act 1950;

H (iv) when there was total failure of consideration and when the hirer did not get what he had bargained for, the agreement becomes void and the hirer is entitled to recover whatever money he had paid under the agreement.

I **[13]** The facts and circumstances of the two cases referred to above are very much similar to the facts and circumstances of the present case and I find comfort in having had to rely on those two judgments of my learned brothers. I place reliance on those two cases in support of my decision here. The failure of the defendant to deliver the proper registration card and to

have the car properly registered upon the full payment by the plaintiff, is a breach of a fundamental term of the hire purchase agreement. As such, the plaintiff as the hirer is entitled to treat the hire purchase agreement as discharged and entitled to claim for damages for the breach of the said agreement or for the return of the money already paid under the agreement (see *Arab Malaysian Finance Bhd v Samian Sabin & Anor* [2003] 5 MLJ 403; [2003] 2 CLJ 115). I hold that the plaintiff is entitled for the refund of the sum he has paid under the hire purchase agreement which is equivalent to RM27,092.

[14] In his evidence, the plaintiff is claiming RM14,400 as damages arising out of the expenses he had to incur to hire a car for his use for a period of six months at the rate of RM80 a day. The plaintiff is claiming another RM10,000 as damages for anxiety caused to him as a result of him being blacklisted by financial institutions as the result of his problem with the hire purchase agreement with the defendant and for the hassle he had to go through in buying another car using his wife's name. The plaintiff is further claiming storage fees for the car at his house initially at RM20 per day and from the month of July 1993 onwards at a rate of RM50 per day.

[15] Considering the evidence available before me, I disallowed the plaintiff's claim for storage fees and his expenses for hiring a car on the ground that there is insufficient evidence to support such claim. However, I allowed the plaintiff's claim for general damages for the anxiety and inconvenience caused to him as a result of the problem he had with the defendant finance company. I accepted the fact that he had been blacklisted and was not in position to obtain financing from any financial institution and also the inconvenience of being deprived the use of the car which he had purchased from the defendant. As a general principle, the measure of damage for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary cause of events, from the breach of the warranty and this includes consequential damages. The plaintiff is entitled to claim for loss of use in the form of general damages. Assessment of damages are based on the evidence adduced and to some extent, the damage may have been inferred or presumed (see *Heng Loong Motor Trading Co v Osman bin Abdullah* [1994] 2 MLJ 456). Having considered the evidence in its totality I am of the view that the sum of RM10,000 claimed by the plaintiff under this heading is unquestionably modest, just and reasonable.

[16] It has further been submitted by learned counsel for the plaintiff that until the date of hearing, the defendant has still failed either to give a valid transfer of the said car to the plaintiff or to repossess the same. Such indifference and irresponsible conduct of the defendant, in learned counsel's view merits the grant of exemplary damages against them. His Lordship

Mohd Nor Ahmad J (as he then was) in *Yip Shou Shan v Sin Heap Lee-Marubeni Sdn Bhd* [2002] 5 MLJ 113 has categorised the circumstances under which exemplary damages may be awarded (see also *Foong Chee Chong (suing as sole proprietor of the firm Tien Chan Goldsmith & Jewellers) v Inspector Mohd Nasir bin Shamsuddin & Anor* [1986] 6 MLJ 421). Suffice it to say that the facts and circumstances of the instant case before me do not merit the making of such an award against the defendant. The plaintiff's claim for exemplary damages must fail.

[17] In conclusion, the plaintiff's claims are allowed in the following terms:

(a) the hire purchase dated 19 March 1991 is declared void;

(b) the plaintiff's claim for the refund of RM27,092 is allowed;

(c) general damages in the sum of RM10,000 is allowed;

(d) costs to the plaintiff; and

(e) interest at 8% pa on the amount awarded under paras (b) and (c) above from the date of filing of the writ of summons to the date of realisation.

Plaintiff's claim allowed with costs.

Reported by Ashgar Ali Ali Mohamed